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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
	)	
Petition of the People of the	)	
State of California and the	)	
Public Utilities Commission of	)	PR File No. 94-SP3
the State of California to	)	
Retain Regulatory Authority of	)	
Intrastate Cellular Service Rates	)	

To: The Commission

REPLY TO OPPOSITIONS TO THE PETITION OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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Summary

The instant proceeding concerns the petition filed by the State of California to retain rate regulatory authority over cellular service (the "Petition"). The Petition was filed in accordance with Section 332(c)(3)(B) of the Communications Act of 1934, as amended, 47 U.S.C. § 332(c)(3)(B). That section authorizes any State to request authority to continue to regulate intrastate rates for commercial mobile radio services ("CMRS") if (1) the State had "in effect on June 1, 1993, any regulation concerning the rates for any commercial mobile service" and (2) the State demonstrates that "market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory." In accordance with that requirement, the Petition (1) explains and otherwise references the regulatory program that California has had in place for cellular service since 1984 and (2) demonstrates why continued regulation of cellular service is necessary in order to assure California subscribers of reasonable and non-discriminatory rates for cellular service.

The Cellular Carriers Association of California ("CCAC") and the other cellular carriers mount a blistering attack on virtually every substantive and procedural aspect of the regulatory program of the California Public Utility Commission ("CPUC"). Some of the carriers even question the integrity of the CPUC itself, claiming that its members lack the ability or

will to act logically or in the best interest of California consumers.

The merit of the criticisms posed by CCAC and other cellular carriers is inversely proportionate to the zeal -- if not hysteria -- with which their arguments are offered. Those arguments rely on basic misconceptions concerning the scope of Section 332, mischaracterize the facts concerning cellular resale in California, convert the speculation of economic experts into undisputed fact, and ultimately proffer claims which inadvertently support rather than undermine the merits of the Petition.

The unambiguous language of Section 332 preempts only State regulation of entry and rates for CMRS and private mobile radio service ("PMRS") providers. The statute did not purport to preempt State regulation of "other terms and conditions" of CMRS, which include matters relating to provision of service to resellers under wholesale rates, interconnection for resellers, or bundling of cellular service with the sale of customer premises equipment ("CPE"). The legislative history makes it clear that these latter items are not subject to FCC review in any State petition filed under Section 332(c)(3)(B). Hence, the carriers' extensive arguments on those latter issues are irrelevant to the Commission's disposition of the Petition.

The carriers' oppositions are equally misguided in claiming that the CPUC can only retain whatever regulations were in place as of June 1, 1993. Neither the statutory language nor the

legislative history of Section 332 supports that contention. The statutory reference to June 1, 1993 was merely designed to grandfather only those States which had a regulatory program in place as of that date and to require other States to secure prior approval from the Commission before inaugurating any new program after enactment. Nothing in the statutory language or the legislative history even suggests, let alone dictates, that a State was precluded from changing any regulations in place on June 1, 1993. The carriers' arguments are equally irrelevant since the CPUC regulatory programs which they complain about had been approved by the CPUC prior to June 1, 1993.

The carriers' misstatements extend to their descriptions of cellular resale service in California. Contrary to the carriers' assertions, cellular resellers have no objection to any decrease in the carriers' rates. The resellers' only concern is that such rate decreases maintain the wholesale rate margin mandated by the CPUC (which is not subject to review by the Commission in its disposition of the Petition).

Nor can the Commission deny the Petition, as the carriers assert, on the basis of the prospective competition from providers of Personal Communications Services ("PCS") or Enhanced Specialized Mobile Radio services ("ESMR"). Although the carriers' economic experts tout the advent of PCS and ESMR as the harbingers of a new competitive environment in the mobile communications market, the plain and simple fact is that neither PCS nor ESMR currently provides any meaningful competition to the

cellular carriers. Moreover, it is not clear when PCS and ESMR will offer such competition. No party has even received a broadband PCS license yet, let alone initiated construction (and Commission rules require that a PCS licensee only serve one-third of its population after the first five years of its license). For its part, Nextel Communications, Inc. ("Nextel") -- the only projected ESMR provider on a national scale -- is in its nascent stage of development, a universally recognized fact which prompted Congress itself to exempt Nextel (and other ESMR providers) from any CMRS regulation until August 1996. To say, then, as the carriers do, that the CPUC has turned a blind eye to imminent competition is to turn the truth on its head -- it is the carriers, rather than the CPUC, who have distorted the reality of competition in the California mobile communications market.

In the final analysis, however, it is the carriers themselves who present the most compelling argument for retention of California's regulatory program. The carriers are confronted by a paradox from which they cannot escape: on the one hand, the carriers' only hope to defeat the Petition is to show that there is indeed real competition in the cellular market and that cellular rates are neither unreasonable nor discriminatory; on the other hand, the carriers must simultaneously show that that competition and those reasonable, non-discriminatory rates are not the product of the regulatory program which the CPUC has had in place since 1984 and which the CPUC wants to retain for

another eighteen (18) months until PCS and ESMR could possibly provide meaningful competition.

Despite their inflated rhetoric, the carriers cannot show that the CPUC's projected regulation for a relatively short interval is not necessary to preserve reasonable and non-discriminatory rates. The carriers confirm that (1) they have continued to make substantial investments in the expansion of capacity and in the improvement of service, (2) they are free to decrease rates on one day's notice (as long as they maintain the mandatory wholesale margin for resellers), (3) high prices are not needed to restrain consumer use of limited capacity, and (4) the carriers have nonetheless been able to earn extraordinarily high rates of return on their actual investments -- returns which would obviously be lower if there were ease of entry and if competition were as vigorous as the carriers proclaim.

The carriers have thus confirmed that, whatever complaints they may have about procedural matters or individual decisions, the CPUC's regulatory program is necessary to ensure that the carriers do not exercise their immense market power to eliminate the mandatory wholesale margin, eliminate cellular resellers (who constitute the only meaningful competition to the cellular carriers), and then raise rates at will.

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To: The Commission

REPLY TO OPPOSITIONS TO THE PETITION OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Cellular Resellers Association, Inc. ("CRA"), Cellular Service, Inc. ("CSI"), and ComTech Mobile Telephone Company ("ComTech") hereby reply to the oppositions filed by the Cellular Carriers Association of California ("CCAC") and other FCC-licensed cellular carriers to the Petition of the People of the State of California and the Public Utilities Commission of the State of California to Retain State Regulatory Authority Over Intrastate Cellular Service Rates (the "Petition").[1/]

I. California Only Required to Have Reasonable Basis for Petition

The carriers' oppositions proceed from an implicit presumption that the Commission can make a de novo review of the facts underlying any State's petition under Section 332 of the Communications Act of 1934, as amended (the "Act"), 47 U.S.C.

[1/]Some of the cellular carriers' oppositions are styled as "Comments" or "Responses," but all of the pleadings oppose the grant of the Petition.

§ 332. This presumption is not supported by the language of Section 332 or its legislative history.

The statutory language is silent on whether the Commission can or should undertake any de novo review of the facts set forth in any State's Petition. However, the legislative history, as well as common sense, dictate that the Commission grant a petition if there is a reasonable basis to support it.

Section 332(c)(3) provides, in pertinent part, as follows:

> (A) Notwithstanding sections 2(b) and 221(b) [of the Act], no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. . . . Notwithstanding the first sentence of this subparagraph, a State may petition the Commission for authority to regulate the rates for any commercial mobile service and the Commission shall grant such Petition if such State demonstrates that—
>
> (i) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or
>
> (ii) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State.
>
> * * *
>
> (B) If a State has in effect on June 1, 1993, any regulation concerning the rates for any commercial mobile service offered in such State on such date, such State may, no later than 1 year after the date of enactment of the Omnibus Budget Reconciliation Act of 1993, petition the Commission requesting that

> the State be authorized to continue exercising authority over such rates. If a State files such petition, the State's existing regulation shall, notwithstanding subparagraph (A), remain in effect until the Commission completes all action (including any reconsideration) on such petition. The Commission shall review such petition in accordance with the procedures established in such subparagraph, shall complete all action (including any reconsideration) within 12 months after such petition is filed, and shall grant such petition if the State satisfies the showing required under subparagraph (A)(i) or (A)(ii). . . .

The statutory language omits any reference to the particular standard which the Commission should apply to any State petition filed under Section 332. Consequently, resort to legislative history is necessary. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

The final language of Section 332(c)(3)(B) concerning the State petitions was included in an amendment offered by Senator Richard Bryan (D-Nev.). At the May 25, 1993 mark-up session of the Senate Commerce Committee on S.335 (the Senate's predecessor bill to the new Section 332), Senator Bryan observed that the "GAO said that there was very little competition in the [cellular marketplace]." Senator Bryan then suggested that "rather than have an automatic preemption [of State regulation], permit those States that currently regulate to do so and then require affirmatively that the FCC would have to determine affirmatively that competition exists. . . ." Commerce Committee, U.S. Senate (May 25, 1993) (unpublished transcript) at 21.

At the mark-up session of June 15, 1993, Senator Bryan presented an amendment which now includes the final language of subparagraph (B). Senator Bryan explained that, under his amendment, the filing of a petition by a State previously engaged in regulation "would then trigger a review by the FCC to determine if competition exists within that State. . . ." Commerce Committee, U.S. Senate (June 15, 1993) (unpublished transcript) at 4 (a copy of which is annexed hereto as Attachment 1). Senator Byron L. Dorgan (D-N.D.) then offered a statement commenting on the standard of review to be applied by the FCC in reviewing any such petition:

> . . . I understand the arguments that have been made to preempt State regulations. Advocates of preemption contend that an array of 50 different jurisdictions will impede the development and delivery of wireless services. However, even with the preemption of terms of entry and rate regulation, as provided under the bill, wireless carriers will still have the complexities of different State rules and areas of conditions of service for example. This is the nature of interstate commerce. Indeed, there is a compelling federal interest in the rapid development and effective delivery of wireless services. <u>However, that interest ought to include a presumption that the States are in a better position to understand consumer needs and the intricacies of industry development in the unique climates of each individual State.</u>
>
> Let me emphasize that I am not absolutely opposed to preempting States in the area of wireless services. If it becomes clear that, in the future, State regulations have become an obstacle for the development of wireless services, I would support preemption. <u>But until that case is made -- and with only a handful of States showing an interest in regulating wireless services at this point,</u>

> it appears that the verdict is still out on this matter -- I would prefer to defer to State regulators.
>
> * * *

Id. at 6 (emphasis added). No Senator at the June 15, 1993 mark-up session took issue with Senator Dorgan's comments on the deference to be paid to State regulators.

The foregoing legislative history -- which constitute the only comments on the standard of review to be applied by the FCC -- makes it clear that the Commission is obligated to grant a State petition if there is a reasonable basis for concluding that continued regulation is necessary to promote reasonable and non-discriminatory rates. Conversely, the Commission can deny a State's petition only if the Commission affirmatively concludes that there is sufficient competition in the marketplace to protect consumers and, hence, no reasonable basis for the State's petition.

The latter guidelines are supported by common sense as well as analogous circumstances in other spheres. It must be remembered that California's Petition (like any State petition requesting a continuation of regulatory authority) is not requesting the inauguration of new authority to confront the problems of an unregulated environment. Rather, California, like other States requesting an extension of regulatory authority, must explain why a termination of rate regulation is likely to produce unreasonable or discriminatory rates. This burden necessarily requires conjecture because (1) prior regulations

would be geared toward assuring subscribers of reasonable and non-discriminatory rates and (2) cellular licensees, like most regulated companies, would try to comply with such regulations, however much they disagree with the philosophy underlying those regulations or the costs entailed to comply with them.

In this context, there is a certain irony to the carriers' complaint that California has failed to produce any proof that its regulatory program would provide any benefit to consumers. The proof, such as it is, comes from the carriers themselves.

However deep-seated their objection to the California regulatory program, the carriers concede that (1) they have made substantial investments to expand capacity and improve service, (2) their rates are reasonable, and (3) they are prepared to introduce new rate decreases on a permanent basis under relatively recent authorization from the CPUC which makes such reductions effective on one-day's notice. See infra at 29-31. All of the foregoing "achievements" have occurred under the CPUC regulatory program.

It is also undisputed that (1) cellular rates are sufficiently high to enable the carriers to earn excessive annual returns on their actual investment,[2/] (2) the rates are not needed to constrain subscriber use of the cellular systems'

[2/]The carriers contend that no reliance should be placed on accounting rates of return and that, instead, reference should be made to "economic rates of return" which take into account the value of the spectrum (and whose inclusion in any rate base would obviously reduce the rate of return). As discussed infra, the carriers' contention has no merit from a regulatory or economic perspective.

limited capacity, (3) there is no ease of entry for facilities-based carriers, and (4) the carriers would like to eliminate whatever competition they face from the non-facilities-based resellers whose ability to compete depends on the CPUC regulatory program. In reviewing the foregoing facts -- as opposed to the carriers' predictions for the future -- it is clear that there is a substantial basis for the Petition.

As a practical matter, it would be difficult, if not impossible, for the Commission to employ a more rigorous standard under de novo review. The Commission does not have the resources to conduct a de novo hearing with respect to each factual premise underlying the Petition. To do so would require evidentiary hearings and undoubtedly the opportunity for cross-examination. From any practical perspective, therefore, the Commission should employ the same kind of reasonable basis test which courts apply in deciding whether there is substantial evidence to support rules adopted by the Commission. 5 U.S.C. § 706(2)(E).

To be sure, the Commission stated that any State seeking to retain regulatory authority over CMRS rates would confront "substantial hurdles." Second Report and Order, 9 FCC Rcd 1411, 1421 (1994). The Commission also identified eight (8) factors in a "non-exhaustive list of examples of the types of evidence, information, and analysis" that the Commission would consider in any review of any State petition. 47 C.F.R. § 20.13(a)(2). However, those substantial hurdles and those lists of factors must take into account the context in which California's Petition

is presented. A State proposing to inaugurate regulations for the first time could be expected to have ample evidence of marketplace failures and consumer dissatisfaction. Conversely, a State like California, where a regulatory program has been in place for ten (10) years, would -- if the regulations had had even modest success -- be more limited in its ability to provide evidence of marketplace deterioration or consumer dissatisfaction. As an example, if the State regulatory program prohibits unreasonable rate discrimination, there are not likely to be many such complaints if carriers try to comply with the regulations and if the State's public utility commission is vigorous in enforcing that proscription. To appreciate the merits of California's Petition, then, it is first necessary to review the basic parameters of its prior regulation of cellular service.

II. CPUC's Regulatory Program Promotes and Preserves Competition

As the Petition explains, the CPUC was concerned from the very inauguration of cellular service in the early 1980s that the presence of only two competitors could lead to unreasonable and discriminatory rates. The CPUC therefore undertook extensive efforts to establish a regulatory program that would, on the one hand, protect the cellular carriers' ability to provide quality service at reasonable rates and, at the same time, ensure that there was a competitive spur through the presence of cellular resellers. Since cellular service and the FCC's creation of a duopoly in the early 1980s presented novel circumstances for

which there was no precedent, the CPUC's program necessarily involved a certain amount of experimentation and revision as more experience was gained. The CPUC's regulatory program, like any human endeavor, cannot claim to have achieved perfection in every sphere. But there can be no doubt about the regulations' success in helping to provide California consumers with reasonable and non-discriminatory rates.

1. General Regulatory Framework

The CPUC framework for cellular regulation was first established in 1984 in response to an application for a certificate of public convenience and necessity filed by the Los Angeles SMSA Limited Partnership, the wireline carrier for Los Angeles then controlled by PacTel Cellular (which has since become AirTouch Communications ["AirTouch"]). In granting the application, the CPUC explicitly required the carrier to establish both wholesale rates and retail rates on the basis of market research rather than costs.[3/] The CPUC identified three reasons to justify the carrier's establishment of wholesale and retail rates: (a) to ensure proper allocation of costs between wholesale and retail operations; (b) to prevent cross-subsidies and other anticompetitive practices; and (c) to provide a viable

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[3/]Thus, McCaw Cellular Communications, Inc. ("McCaw") is incorrect in asserting that wholesale rates were not market-based. McCaw Opposition at 20. Rather, as the CPUC stated, retail rates were based on market research and "wholesale rates were derived as a portion of retail rates and compared, element by element, to make sure the component costs were fully covered." Decision 84-04-014 at 60.

business opportunity in the marketplace for cellular resale. Decision 84-04-014 at 81-84. See Decision 90-06-025 at 68.[4/] To further those purposes, CPUC established a Cellular Uniform System of Accounts ("USOA") in 1986 which required carriers to segregate accounting for wholesale and retail operations.

The foregoing decisions were not designed to protect cellular resellers as a favored class but to assure competition on a level playing field for all retail providers of cellular service -- including carrier retail affiliates and independent resellers.[5/] In so doing, the CPUC was discharging its duty under Section 451 of the California Public Utilities ("PU") Code, which requires the CPUC to ensure just and reasonable rates among common carriers, and Section 453 of the PU Code, which provides, in pertinent part, as follows:

> (a) No public utility shall, as to rates, charges, services, facilities, or in any other respect, make or grant any preference or advantage to any corporation or person, or subject any corporation or person to prejudice or disadvantage or . . .

[4/]The CPUC's promotion of viable resale opportunity in California was based, in part, on the FCC's own policies to introduce competition into the duopoly cellular industry through resale. See Decision 84-04-014.

[5/]In its second cellular licensing decision involving GTE Mobilnet's entry as the first cellular service provide in San Francisco/San Jose, the CPUC presciently realized that some regulation was necessary because of the likelihood that the duopoly carriers would earn excessive returns after only a few years of operations. Decision 84-11-029. As Decision 94-08-022 later indicated (at 54-59), those excessive profits have been determined to exist in the larger MSAs. See Appendix N to the Petition and Declaration of Charles L. King, annexed hereto as Attachment 2, at Attachment 1.

> (c) establish or maintain any unreasonable difference as to rates, charges, services, facilities, or in any other respect either as between localities or as between classes of service.

2. Establishment of Wholesale/Retail Divisions

In its first generic cellular investigation in 1990, the CPUC made three salient determinations concerning cellular competition in California after six years of operation: (a) the reseller market was expansively defined to include the FCC-licensed carriers and independent resellers; (b) independent resellers perform and thereby relieve the FCC-licensed carriers of a variety of functions and attendant costs, including marketing, credit checks, billing, collections, customer service, and bad debt risk (excluding only the wholesale functions of call switching, routing and delivery); and (c) cellular carriers' wholesale revenues could not subsidize the carriers' retail operations. Decision 90-06-025. at Fdg. of Fact 23, Cncl. of Law 3. See also Decision 90-06-025 at Fdg. of Fact 116.

To implement its policies, the CPUC required the cellular carriers to operate their retail divisions on a compensatory (break-even or better) basis so that independent resellers could effectively purchase service through the same wholesale tariff available to the retail divisions and affiliates of the duopoly carriers. Decision 90-06-025, Mimeo at 73-75. To achieve this regulatory parity, the CPUC required that the duopoly carrier retail divisions and affiliates impute any wholesale rates to

these retail divisions or affiliates and account for wholesale and retail expenses.[6/]

The foregoing rulings, like the CPUC's earlier rulings, were designed to ensure that carriers' retail divisions and separate retail affiliates would not receive more favorable rates than the independent resellers.[7/] The carriers complied. As an example, annexed hereto as Attachment 4 is a copy of the LA/SMSA Limited Partnership 1992 Annual Report filed with the CPUC reflecting the wholesale and retail revenues and expenses.

3. Enforcement Against Unreasonable Discriminatory Carrier Actions

The CPUC's prohibitions against unreasonable discrimination and unjust and unreasonable rates have been the subject of various CPUC proceedings over the years. For example, in CPUC Investigation and Suspension 85-07-024 (Attachment 5), the CPUC found that GTE Mobilnet had proposed a promotional rate which would unreasonably discriminate against independent resellers and a reseller affiliate of facilities-based carrier Bay Area Cellular Telephone Company ("BACTC"). The CPUC found that GTE

[6/]Attachment 3 hereto is Decision 88-08-063, which sets forth the accounting requirements applicable to all FCC-licensed carriers in the context of a merger of GTE Mobilnet's wholesale and retail affiliates.

[7/]The CPUC's action was issued in accordance with Section 532 of PU Code, which provides, in pertinent part, that no public utility may "charge, or receive a different compensation for any product or charge . . . than the rates . . . specified in its schedules . . . or extend to any corporation or person any form of contract or agreement or any rule or regulation or any facility or privilege except such as are regularly and uniformly extended to all corporations or persons."

Mobilnet's promotional rate would undermine cellular resale and thereby hamper cellular rate competition. The CPUC Investigation protected any customer that had already taken the promotional offer, suspended any further offerings, and instituted an investigation to determine proper rate offerings.

In promoting reasonable and nondiscriminatory rates for all resellers (including duopoly carrier affiliates), the CPUC generally recognized that there were economies of sale for the provision of wholesale service to large customers, including resellers, which resulted in lower (a) bad debt losses, (b) marketing and billing costs, and (c) churn rates. Decision 90-06-025 at 33. The CPUC eventually concluded that bulk sales at lower rates should be allowed because a large customer generally performed certain customer functions otherwise performed by the carrier, thereby eliminating some of the carrier's expenses.[8/] Decision 90-06-025 at 95-97. The CPUC set a minimum 5% margin between wholesale and retail rates for such bulk sales so that resale common carriers could have some leeway to cover their regulatory expenses and consumer service

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[8/]This part of Decision 90-06-025 evolved from Decision 90-05-024, which disposed of a complaint by resellers and 12 agents of PacTel Mobile alleging that BACTC had violated its tariffed rates by providing unreasonably discriminatory rates to the San Jose Real Estate Board. The CPUC held that the tariff violations caused unfair customer losses to BACTC's competitors, that the San Jose Real Estate Board was unlawfully assessing additional charges to the utility's bill, and that BACTC's competitors were disadvantaged in an anticompetitive manner. The CPUC ordered BACTC to cease and desist form discriminating in favor of the San Jose Real Estate Board pending the CPUC's determination of fair volume user rate guidelines for the cellular industry.

obligations. Id. at 33-34. Thus, volume discounts were allowed under non-discriminatory rules for all bulk purchasers, including resellers.[9/]

The CPUC policed discriminatory rate offerings which violated the CPUC's volume user policies. In Decision 90-12-038, the CPUC fined US WEST Cellular of California Inc. ("US WEST") $6,000 for falsely asserting to the CPUC that volume user rates were being properly confined to qualified large user groups. The Decision also ordered US WEST to file corrected tariffs that afforded volume user rates in accordance with CPUC decisions and which included proper consumer safeguards.[10/] See Attachment 6 annexed hereto.

Another action which addressed discriminatory rates was Decision 91-12-002, annexed hereto as Attachment 7. That Decision resolved a complaint by CRA alleging that Los Angeles

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[9/]The CPUC also established consumer safeguards to ensure that only qualified volume users could receive bulk rates.

[10/]In its Comments on the Petition in the instant matter, US WEST claims a variety of ills stemming from delays in approval by the CPUC of such matters as uniform roaming rates, limits on gifts, air time promotions, and further discounts to large users. As Decision 90-12-038 reflects, however, many of US WEST's problems are of its own making. As US WEST's own pleading before this Commission recognizes, the CPUC gave advance approval to US WEST's roamer rate changes, merely requesting that US WEST advise consumers of rate increases attendant thereto, a pro-consumer initiative. As to the gift limitations noted by US WEST, those too emanate from US WEST's failure to abide by the aforementioned cross-subsidy and wholesale margin requirements. See Decision 92-02-076. Finally, nothing has ever precluded US WEST from offering steeper volume discounts in California to large entities, so long as the carrier complies with the quite minimal 5% margin for volume users.

Cellular Telephone Company ("LA Cellular") was misusing the bulk sales option to unreasonably discriminate against retail customer generally and certain high-volume users. Through the auspices of the CPUC, LA Cellular entered into a settlement agreement with CRA that extended volume user rates to all qualified volume users and guaranteed that volume discounts would not be given to parties who operated as "fronts" to allow individuals to receive discounts to which they were not entitled.

The CPUC has also provided a forum to thwart other forms of duopoly carrier discrimination against independent resellers. In Decision 93-01-014, LA Cellular attempted to institute a system of credits for its customers to induce the use of digital service when LA Cellular commenced the digital conversion of its network. CRA protested because LA Cellular's program would not be provided to the resellers' retail customers, and because the proposal would lead to anticompetitive price squeezes between wholesale and retail rates. As a result of a CPUC prehearing conference promoting settlement, LA Cellular agreed to a stipulation that all reseller customer would be afforded the same rate credits promoting the digital conversion and that all resellers and their customers could acquire dual-mode (analog and digital) equipment on a nondiscriminatory basis. This latter provision was consistent with Commission policy: "Any restrictions on resellers' ability to buy packages of CPE and service on the same basis as other customer[s] would be unlawful." Bundling of

Cellular Customer Premises Equipment and Cellular Service, 7 FCC Rcd 4028, 4035 n.48 (1992).

The CPUC also sanctioned two settlement agreements designed to protect consumers and resellers against discriminatory action in its approval of the AT&T/McCaw merger. The first agreement involved all parties except Pacific Telesis and its cellular subsidiary. That settlement agreement provided for a plan for equal access for all McCaw systems, prevention of discriminatory bundling of rate packages, protection against disclosure of customer proprietary information, and a forum for resolving any complaints against the merged company. See Attachment 8. The second settlement agreement, a copy of which is annexed hereto as Attachment 9, was with CRA alone and states that resellers of the merged company's cellular service would be provided (a) 20% rate discounts on long distance rates pending the completion of equal access on all such systems (because AT&T/McCaw refused to allow resellers to select their own long distance carriers), (b) a margin of at least 22% on existing enhanced service rates (because McCaw refused to allow resellers to provide their own independent enhanced services), (c) nondiscriminatory treatment of resellers for roaming purposes so that resellers could share roaming revenue to the extent that their customers roamed on AT&T/McCaw systems, (d) elimination of anticompetitive wholesale rate termination charges where the reseller remains financially responsible for any numbers purchased from AT&T/McCaw, and (e) a statement of policy that the merged company would not attempt to

obtain customer-specific network information of resellers reselling on McCaw systems.[11/]

4. Authorization of Rate Reductions

The CPUC's protections against discriminatory rates were coupled with its promotion of competitive reductions in service rates of as much as 10 percent effective upon the date of filing of a tariff revision. Decision 90-06-025 at 108, ordering paragraph 8. No limit was set on the number of decreases any carrier could adopt. In allowing such rate decreases, the CPUC did not set mandatory margins. Instead, the CPUC only required that the existing margins for each carrier (initially established on an MSA-by-MSA basis) remain in place pending adoption of a modification to the CPUC's existing cellular USOA, unless a duopoly carrier could "demonstrate through an advice letter filing" that its "retail operation will continue to operate on a break-even or better basis with proposed changes that impact the mandatory retail margin." Id. Conclusion of Law 15, Mimeo at 110. Significantly, no duopoly carrier has ever made the "break-

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[11/]Although AirTouch disparages the protest process at the CPUC, AirTouch Comments at 63-65, it was AirTouch that filed such protests against the AT&T/McCaw merger. Similarly, a review of Appendix N to AirTouch's Comments (which reflects 32 reseller protests of AirTouch advice letters from August 1990 through September 1994) fails to mention that its Los Angeles affiliate, LA/SMSA, has failed 441 Advice letters with the CPUC, its San Francisco/San Jose affiliate has filed 300 Advice Letters, its Sacramento affiliate has filed 190 Advice letters, and AirTouch of San Diego has filed 198 letters. Hence, of the combined 1,129 Advice letters filed by AirTouch affiliates, resellers have protested 32, or a total of 2.8% of these filings -- hardly an illustration of regulatory gridlock.

even" showing before or after adoption of the modified USOA in Decision 92-10-020.[12/]

Although the CPUC contemplated that carriers would be able to raise rates to those previously in existence in a noncontroversial manner, the duopoly carriers later advised the CPUC that they were unwilling to decrease rates for fear that they would be unable to raise rates back to rates previously in place.[13/] The CPUC expressed understandable skepticism about the truth of the carriers' concern but accommodated them by adopting rate band guidelines which authorized a carrier to file rate bands with a right to return to prior rates upon one day's notice -- as long as the wholesale/retail margins were preserved. See Decision 93-04-058, annexed hereto as Attachment 10. Thus, the duopoly carriers were given the very protection they sought to allow them to reduce rates as much as they wanted (as long as the price decreases were not used to undercut the wholesale margin and thereby cripple the resellers' ability to compete).

In adopting the rate band guidelines, the CPUC accepted the duopoly carriers' representations that capacity was not a problem

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[12/]Although the modified USOA changes were later stayed by Decision 93-05-069, the margin requirements were maintained to prevent price squeezes and ensure that all retail service providers -- including resellers -- were offered the same wholesale pricing.

[13/]In contrast to their disparaging comments on the Petition in the instant proceeding, the duopoly carriers acknowledged to the CPUC at the time that the retail cellular market in California had been functioning well under the regulatory regime that preceded the 1990 Decision which included 30 and 40-day notice periods for rate plan filings. See McCaw and PacTel (Air Touch) comments as described in Decision 90-06-025 at 69-70.